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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-105

GOLDEN EAGLE, aka LEE ROY AUSTINE,
*Petitioner,*

vs.

DEPUTY SHERIFF JOHNSON, et al.,
*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENTS PETERS AND HEERD IN OPPOSITION

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## TOPICAL INDEX


| | Page |
|---|---|
| STATUTES INVOLVED | 1 |
| QUESTIONS PRESENTED | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | |
| I. RESPONDENTS PETERS AND HEERD ARE NOT SUBJECT TO CIVIL LIABILITY UNDER THE CIVIL RIGHTS ACT FOR THEIR GOOD FAITH ENFORCEMENT OF STATE LAW | 2 |
| II. WHETHER PETITIONER IS ENTITLED TO PRE-ARREST PROCEDURES IN ADDITION TO THOSE PROVIDED BY STATE LAW IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT | 4 |
| III. PETITIONER'S USE, POSSESSION AND TRANSPORTATION OF PEYOTE ARE NOT INTERESTS PROTECTED BY FEDERAL LAW | 9 |
| IV. THE SEIZURE OF THE PERSONAL RELIGIOUS ARTICLES WAS CONSTITUTIONAL, AND NEED NOT BE REVIEWED BY THIS COURT | 12 |
| CONCLUSION | 14 |

## TABLE OF AUTHORITIES CITED

### CASES


| | Page |
|---|---|
| Astro Cinema Corp. v. Mackell (2d Cir. 1970) 422 F.2d 293 | 7 |
| Bethview Amusement Corp. v. Cahn (2d Cir. 1969) 416 F.2d 410 | 7 |
| Dragna v. White (1955) 45 Cal.2d 469, 289 P.2d 428 | 5 |
| Golden Eagle v. Johnson (9th Cir. 1974) 493 F.2 1179 | 2, 8, 9 |
| Heller v. New York (1973) 413 U.S. 483 | 7 |
| Kennedy v. Bureau of Narcotics and Dangerous Drugs (9th Cir. 1972) 459 F.2d 415 | 9 |
| Leary v. United States (5th Cir. 1967) 383 F.2d 851 | 9, 10, 11 |
| Milky Way Production, Inc. v. Leary (S.D.N.Y. 1969) 305 F.Supp. 288 | 8 |
| Negrich v. Hohn (W.D. Pa. 1965) 246 F.Supp. 173 | 3 |
| People v. Woody (1964) 61 Cal.2d 716, 394 P.2d 813 | 9, 10, 11, 12 |
| Pierson v. Ray (1967) 386 U.S. 457 | 2 |
| Pugliano v. Staziak (W.D. Pa. 1964) 231 F.Supp. 347 | 3 |
| Roberts v. Barbosa (S.D. Cal. 1964) 227 F.Supp. 20 | 3 |
| Sherbert v. Verner (1963) 374 U.S. 398 | 10 |
| State v. Bullard, 267 N.C. 599, 148 S.E. 2d 565 | 11 |
| United States v. Hudson (5th Cir. 1970) 431 F.2d 468 | 10 |
| United States v. Kuch (D.C. 1968) 288 F.Supp. 439 | 10 |
| United States v. Skeeters (1954) 122 F.Supp. 52 | 5 |
| United States v. Wild (2d Cir. 1969) 422 F.2d 34 | 7 |
| Warden v. Hayden (1967) 387 U.S. 294 | 12, 13 |


### CODES


| | |
|---|---|
| California Health and Safety Code § 11363 | 3 |
| § 11377 | 3 |
| California Penal Code § 859b | 6 |
| § 995 | 6 |
| § 1538.5 | 6 |


### CONSTITUTION


| | |
|---|---|
| United States Constitution First Amendment | 9 |

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## STATUTES INVOLVED

In addition to the provisions of law cited by petitioner, respondents Peters and Heerd have set forth pertinent statutes in the Appendix hereto.

## QUESTIONS PRESENTED

1. Whether respondents Peters and Heerd are subject to civil liability under the Civil Rights Act for their good faith enforcement of state law.

2. Whether petitioner is entitled to pre-arrest procedures in addition to those provided by state law.

3. Whether petitioner's use, possession and transportation of peyote are interests protected by federal law.

4. Whether the seizure of the personal religious articles was constitutional.

## STATEMENT OF THE CASE

The opinion of the court below fairly and concisely summarized the factual allegations and procedural steps relevant to this proceeding. Responents Peters and Heerd rely entirely on the statement of the court below, which is reported at *Golden Eagle* v. *Johnson* (9th Cir. 1974) 493 F.2d 1179, 1180–1182.

## ARGUMENT

### I. Respondents Peters and Heerd Are Not Subject to Civil Liability Under the Civil Rights Act for Their Good Faith Enforcement of State Law

It is well established that good faith enforcement of state criminal statutes cannot lead to liability under the Civil Rights Act. *Pierson* v. *Ray* (1967) 386 U. S. 547.

> "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. (Citations omitted.) A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. . . . "

*Id.* at 555.

Petitioner does not claim that there was no probable cause for his arrest, as there obviously was. Officers Heerd and Peters legitimately stopped him for a California Vehicle Code violation, and when he told the officers of his possession of peyote and the other drugs, they clearly had probable cause to believe he had violated California Health and Safety Code sections 11540 (possession of peyote, superseded by § 11363 of the 1972 California Uniform Control Substances Act) and 11910 (possession of a restricted dangerous drug, superseded by § 11377). Whether petitioner had a valid religious defense to the first charge and a valid prescription for the other drugs were matters to be asserted at a later stage in his criminal proceedings.

Although it is alleged that the officers acted in bad faith, this allegation is conclusionary, without any indication of supporting facts, and inadequate to sustain a Civil Rights Act suit. *Roberts* v. *Barbosa* (S.D. Cal. 1964) 227 F.Supp. 20, 22; *Pugliano* v. *Staziak* (W.D. Pa. 1964) 231 F.Supp. 347, 349. Moreover, the motive of state officials is irrelevant if the action they take is authorized by law. *Negrich* v. *Hohn* (W.D. Pa. 1965) 246 F.Supp. 173, 177. The officers were clearly acting pursuant to law well established at the time of the arrest.

The petition for writ of certiorari makes it clear that petitioner is seeking a change in state law to provide him with protections which were not required by the law at the time petitioner was arrested. Under no analysis can the highway patrolmen who made the

initial arrest be expected to have acted other than they did. Because respondents Peters and Heerd are immune from liability for their good faith enforcement of the law as it existed on the night of July 11, 1970, petitioner has not stated a claim against them, and the complaint against them was properly dismissed by the district court. Likewise, the petition for writ of certiorari should be denied at least insofar as it seeks review of claims against respondents Peters and Heerd.

## II. Whether Petitioner Is Entitled to Pre-Arrest Procedures in Addition to Those Provided by State Law Is Not an Important Question of Federal Law Requiring Resolution by This Court

The primary thrust of the petition for writ of certiorari is a request that this Court declare that petitioner is entitled to certain "sensitive" pre-arrest safeguards, other than those provided all arrestees by existing state law, in order to protect what he claims is his right to possess, use and transport peyote for religious purposes. Even assuming *arguendo* that petitioner has a right to possess, use and transport peyote, a proposition not accepted by federal courts, petitioner does not have a right to the pre-arrest procedures sought. First, the protection sought by petitioner is substantially provided by existing state law. Second, the procedures sought by petitioner are not constitutionally required and would not provide him with the relief he desires.

### A. PETITIONER IS ADEQUATELY PROTECTED BY EXISTING STATE LAW

Petitioner urges this Court to mandate pre-arrest safeguards for persons found in possession of peyote claiming a religious defense. Specifically, he requests that an Indian in possession of peyote for religious purposes not be arrested without a warrant until a pre-arrest adversary hearing is conducted to determine whether his possession of the peyote is for bona fide religious purposes. In the alternative, he urges that no arrest occur until an *ex parte* hearing before a magistrate is conducted on the same question.[1] These contentions are greatly weakened by his concession that a police officer may take a suspect into custody until either the warrant hearing or the adversary hearing can be held.

What petitioner urges is substantially the same procedure followed in all criminal arrests in California.

A person arrested in California with or without a warrant must, "without unreasonable delay," be taken before a magistrate. A police officer who delays unreasonably is liable for false imprisonment. *Dragna* v. *White* (1955) 45 Cal.2d 469, 289 P.2d 428. It is unreasonable to delay taking a person arrested on Saturday afternoon before a magistrate until the following Tuesday morning; he should be brought before a magistrate on Monday morning. *United States* v. *Skeeters* (1954) 122 F.Supp. 52.

[1] In his petition, petitioner does not advance a third alternative urged by him in the court below, that the arresting officers conduct a roadside inquiry into the question of his good faith religious beliefs.

Within ten days of arraignment or plea, a defendant is entitled to a preliminary hearing to determine whether there is probable cause to hold the defendant for trial. California Penal Code section 859b. Should probable cause be found at this hearing, and the defendant bound over to superior court for trial, he may challenge the legality of any seizure of evidence (California Penal Code § 1538.5) and may set aside the indictment or information as not founded on probable cause (California Penal Code § 995).

Thus, within a short time after arrest (not later than ten days of arraignment, which must be prompt), all criminal defendants have the right to a pre-trial adversary hearing before a magistrate. Specifically, petitioner in the present case had the right to an inquiry into his religious defense very soon after his arrest.

Petitioner characterizes the hearing he seeks as "pre-arrest." Yet he would allow the police to "take the suspect into custody and impound the peyote until this determination can be made." (Petition page 13, footnote 4). How this taking into custody differs from an arrest is impossible to fathom. The difference between holding a suspect in custody until a "pre-arrest" hearing can be held and arresting a suspect followed by a prompt preliminary hearing is equally impossible to discern.

Because there is little or no difference between present California criminal procedure, and the system

proposed by petitioner, the petition for writ of certiorari does not raise an important question of federal law, and should be denied.

### B. THE PROCEDURES SOUGHT BY PETITIONER ARE NOT CONSTITUTIONALLY REQUIRED

If petitioner is actually seeking a true pre-arrest adversary hearing (and not one held after the suspect is taken into custody), he can find no basis in the federal constitution to support his position.

At the time petitioner originally urged this position, he relied heavily on *Bethview Amusement Corp.* v. *Cahn* (2d Cir. 1969) 416 F.2d 410, which required an adversary hearing prior to a seizure of allegedly obscene movie films. He argued that this First Amendment protection should by analogy be extended to the circumstances of the present case.

Since that time, this Court has expressly disapproved *Bethview, supra,* and a similar case, *Astro Cinema Corp.* v. *Mackell* (2d Cir. 1970) 422 F.2d 293. In *Heller* v. *New York* (1973) 413 U.S. 483, 488, 493, this Court held that no pre-arrest adversary hearing was required by the First Amendment, and that indeed such a hearing would not materially increase First Amendment protection.

The reasoning of *Heller, supra,* is directly applicable in this case. A requirement of a pre-arrest adversary hearing would not materially reduce any chilling effect on the exercise of religious expression, as claimed by petitioner, but would at best merely advance any chilling effect to an earlier stage in the proceedings.

In *Milky Way Production, Inc.* v. *Leary* (S.D.N.Y. 1969) 305 F.Supp 288, 297, aff'd. 397 U.S. 98 (1970), a three-judge court was convened to consider, inter alia the issue:

> "It is inappropriate, we think, to 'weigh' (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the departure they urge are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity. (Citations omitted.)"

See also *United States v. Wild* (2d Cir. 1969) 422 F. 2d 34.

The reasoning of the court below is also persuasive on this issue. The opinion pointed out that the California Supreme Court, in holding that possession of peyote for religious purposes was protected in California, nowhere indicated that ordinary criminal procedures were to be altered in a questionable effort to reduce further the "chilling effect" of California laws relating to peyote. *Golden Eagle* v. *Johnson* (9th Cir. 1974) 493 F.2d 1179, 1185.

The procedures urged by petitioner find no support in law or reason. Petitioner has not raised an important question of federal law requiring resolution by

this Court, and the petition for writ of certiorari should be denied.

### III. Petitioner's Use, Possession and Transportation of Peyote Are Not Interests Protected by Federal Law

If petitioner is entitled to some pre-arrest safeguards in addition to those already provided by state law, it becomes necessary to examine the underlying assumption that he has a right protected by the federal constitution to use, possess and transport on a public highway the drug peyote.

This proposition is not accepted by federal courts. As stated by the court below, citing *Kennedy* v. *Bureau of Narcotics and Dangerous Drugs* (9th Cir. 1972) 459 F.2d 415, neither this Court nor any other federal court has extended First Amendment protection to the religious use of peyote by the members of any church. *Golden Eagle* v. *Johnson, supra,* 493 F.2d 1179, 1183.

Petitioner cites *People* v. *Woody* (1964) 61 Cal.2d 716, 394 P.2d 813, for the proposition that the First Amendment protects the right of Indian communicants in the Native American Church to take peyote as a religious sacrament.

The leading federal case is *Leary* v. *United States* (5th Cir. 1967) 383 F.2d 851, 859–860, reh.den., 392 F.2d 220, reversed on other grounds, 395 U.S. 6. Defendant was convicted under various federal marijuana statutes. On appeal, the court refused to recognize his claimed religious belief as a defense.

". . . The testimony of appellant's witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marijuana for religious rituals by certain sects in India.

"Appellant's reliance on *Sherbert* v. *Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts."

Thus, the court expressly rejected the *Verner* rationale utilized by the California Supreme Court in *Woody, supra,* at pp. 723–724. But the court went even further than merely rejecting the rationale, saying: "We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned." *Leary, supra,* at p. 861.

A similar rationale was utilized in *United States* v. *Kuch* (D.C. 1968) 288 F.Supp 439. And in *United States* v. *Hudson,* (5th Cir. 1970) 431 F.2d 468, 469, the court held:

"Finally, it is argued that the district court should have permitted the jury to pass on appellants' assertions that they are sincere followers of the Moslem or Islamic religion, which sanctions the use of heroin and marijuana. Appellants claim that failure to admit this evidence violates their first

amendment right to freedom of religion. We disposed of this question in *Leary* v. *United States,* 5th Cir., 1967, 383 F.2d 851, 859–862, reversed on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed. 2d 57 (1969), where we cited numerous authorities in support of the proposition that the use of drugs as part of religious practice is not constitutionally privileged."

See also *State* v. *Bullard,* 267 N.C. 599, 148 S.E. 2d 565, cert. den. 385 U.S. 917 (1966), in which the defendant made contentions identical to those made by defendant in *Woody.* The court held that even assuming them to be sincere, that would not be a defense, for the First Amendment does not authorize acts contrary to the public safety, morals, peace and order committed in the course of free exercise of a religion.

Petitioner assumes that because Indians in California are protected in the sacramental use of peyote in their religious services that they are similarly protected in the use, transportation, or possession of peyote at any time. The assumption is faulty.

The California Supreme Court in *People* v. *Woody, supra,* 61 Cal.2d 716, upheld the limited right of members of the Native American Church to possess and use peyote where the peyote was possessed only for use in the bona fide religious ceremonies of that church, in accordance with the long established method of worship followed by the church and its members, under which peyote was an essential element of the defendants' religious faith and practice. In *Woody,* defendants were arrested during performance of their

religious ceremonies in a hogan near Needles, California, and the court observed, "The state agrees, and the evidence amply demonstrates, that defendants' use of peyote was for a religious purpose." *Woody* at p. 727.

Arrests made during performance of bona fide religious services are a far cry from an arrest of an individual on a public highway who possesses the contraband in a vehicle. Petitioner makes no allegation that the peyote seized was possessed or being transported for use in a religious ceremony.

The extension of the doctrine of *Woody* urged by petitioner would effectively negate the state's power to regulate the use, transportation and possession of peyote. An abuser of the drug would merely have to place his contraband in some type of container with real or pseudo religious markings in order to take it out of the realm of contraband and into the realm of religion.

It is submitted that the conduct engaged in by appellant is not protected by the *Woody* decision, and that even should this Court decide to protect members of the Native American Church in their religious use of peyote, similar protection should not be extended to mere possession or transportation on a public highway.

**IV. The Seizure of the Personal Religious Articles Was Constitution, and Need Not Be Reviewed By This Court**

By citing *Warden* v. *Hayden* (1967) 387 U.S. 294, petitioner appears to contend that the box containing the peyote and other items was of mere evidentiary value, and should not have been seized. However,

*Hayden* stands for the opposite proposition, for it is the case in which this Court abandoned the distinction between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband.

Petitioner further asserts that the officers could have had no cause to believe that the evidence seized would aid in conviction. That the container of the contraband drugs has a bearing on appellant's guilt cannot be disputed. The officers were justified in seizing this important evidence, which was so closely connected with the contraband as practically to be identified with it. The allegedly religious markings and character of the other items in the box could be used by appellant to establish his religious defense, had the case gone to trial. On the other hand, the prosecution could have used the evidence to establish that appellant's beliefs were not bona fide should expert testimony be able to establish that the markings were of no significance in appellant's religion. In any case, the officers clearly had probable cause to believe that the items would be of evidentiary value.

## CONCLUSION

It is respectfully requested that the petition for a writ of certiorari be denied.

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## APPENDIX

### California Health and Safety Code

Section 11363.

(a) Every person who plants, cultivates, harvests, dries, or processes any plant of the genus Lophophora, also known as peyote, or any part thereof shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not more than 10 years.

(b) If such person has been previously convicted of any offense described in subdivision (c), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years.

(c) Any previous conviction of any of the following offenses, or of an offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such an offense, shall be charged pursuant to subdivision (b) of this section:

(1) Any offense described in Section 11378, 11379, or 11380.

(2) Any offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section

11054, or specified in subdivision (b) or (c) of Section 11055.

(3) Any offense described in this division involving a narcotic drug classified in Schedule III, IV, or V.

Section 11377.

(a) Except as otherwise provided in Article 8 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, other than any substance specified in paragraph (6) of subdivision (b) of Section 11056, and which is not a narcotic drug or (2) which is specified in subdivision (d) of Section 11054, except paragraphs (10), (11), (12), and (17) of such subdivision or specified in subdivision (d) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison for a period of not less than one year nor more than 10 years.

(b) Except as otherwise provided in Article 8 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance specified in paragraph (6) of subdivision (b) of Section 11056, unless upon the prescription of a physician, dentist, podiatrist or veterinarian licensed to practice in this state, shall be punished by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

(c) If a person charged with an alleged violation of subdivision (a) has been previously convicted once of any offense described in subdivision (d), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

(d) Any previous conviction of any felony offense described in this article, of a conspiracy to commit any offense described in this article, or of any offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such a felony offense, shall be charged pursuant to subdivision (c).

**California Penal Code**

Section 821.

If the offense charged is a felony, and the arrest occurs in the county in which the warrant was issued, the officer making the arrest must take the defendant before the magistrate who issued the warrant or some other magistrate of the same county.

If the defendant is arrested in another county, the officer must, without unnecessary delay, inform the defendant in writing of his right to be taken before a magistrate in that county, note on the warrant that he has so informed defendant, and, upon being required by defendant, take him before a magistrate in that county, who must admit him to bail in the amount specified in the endorsement referred to in Section

815a, and direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than 10 days after such admittance to bail. If bail be forthwith given, the magistrate shall take the same and endorse thereon a memorandum of the aforesaid order for the appearance of the defendant, or, if the defendant so requires, he may be released on bail set on the warrant by the issuing court, as provided in Section 1269b of this code, without an appearance before a magistrate.

If the warrant on which the defendant is arrested in another county does not have bail set thereon, or if the defendant arrested in another county does not require the arresting officer to take him before a magistrate in that county for the purpose of being admitted to bail, or if such defendant, after being admitted to bail, does not forthwith give bail, the arresting officer shall immediately notify the law enforcement agency requesting the arrest in the county in which the warrant was issued that such defendant is in custody, and thereafter such law enforcement agency shall take custody of such defendant within five days in the county in which he was arrested and shall take such defendant before the magistrate who issued the warrant, or before some other magistrate of the same county.

Section 822.

If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, without unnecessary delay, inform the defendant in writing of his right to be taken before a magistrate in that county, note on the warrant that he has so informed defendant, and, upon being required by defend[illegible]ke him before a magistrate in that county,

who must admit him to bail in the amount specified in the indorsement referred to in Section 815a, or if no bail is specified, the magistrate may set bail: if the defendant is admitted to bail the magistrate shall direct the defendant to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than 10 days after such admittance to bail. If bail be forthwith given, the magistrate shall take the same and indorse thereon a memorandum of the aforesaid order for the appearance of the defendant.

If the defendant arrested in another county on a misdemeanor charge does not require the arresting officer to take him before a magistrate in that county for the purpose of being admitted to bail, or if such defendant, after being admitted to bail, does not forthwith give bail, the arresting officer shall immediately notify the law enforcement agency requesting the arrest in the county in which the warrant was issued that such defendant is in custody, and thereafter such law enforcement agency shall take custody of such defendant within five days in the county in which he was arrested and shall take such defendant before the magistrate who issued the warrant, or before some other magistrate of the same county.

If a defendant is arrested in another county on a warrant charging the commission of a misdemeanor, upon which warrant the amount of bail is indorsed as provided in Section 815a, and defendant is held in jail in the county of arrest pending appearance before a magistrate, the officer in charge of the jail shall, to the same extent as provided by Section 1269b, have authority to approve and accept bail from defendant in the amount indorsed on the warrant, to issue and sign

an order for the release of the defendant, and, on posting of such bail, shall discharge defendant from custody.

Section 823.

On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant to the officer having charge of the defendant. The magistrate shall issue to defendant a receipt for the undertaking of bail. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant to the clerk of the court at which the defendant is required to appear. If the undertaking of bail is in the form of a bond, the magistrate shall forward the bond to the court at which defendant is required to appear. If the undertaking is in the form of cash, the magistrate shall deposit the cash in the county treasury, notifying the county auditor thereof, and the county auditor shall, by warrant, transmit the amount of the undertaking to the court at which the defendant is required to appear. If authorized by the county auditor, the magistrate may deposit the money in a bank account pursuant to Section 68084 of the Government Code, and by check drawn on such bank account transmit the amount of the undertaking to the court at which the defendant is required to appear.

Section 825.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when

the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

Section 849.

(a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person was arrested only for being under the influence of a narcotic, drug, or restricted dangerous drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable.

(c) Any record of arrest of a person released pursuant to paragraphs (1) and (3) of subdivision (b) shall include a record of release. Thereafter, such arrest shall not be deemed an arrest, but a detention only.

Section 859.

When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him that he has the right to have the assistance of counsel, ask him if he desires the assistance of counsel, and allow him reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that he must be represented in court by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned for him, and allow him a reasonable time to send for his chosen or assigned counsel. The magistrate must, upon the request of

the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor.

Section 859a.

If the public offense charged is a felony not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein and to a previous conviction or convictions of crime if charged; thereupon, or at any time thereafter, while the charge remains pending before the magistrate and when his counsel is present, the defendant may plead guilty to the offense charged, or, with the consent of the magistrate and the district attorney or other counsel for the people, plead nolo contendere to the offense charged or plead guilty or nolo contendere to any other offense the commission of which is necessarily included in that with which he is charged, or to

an attempt to commit the offense charged and to the previous conviction or convictions of crime if charged; and upon such plea of guilty or nolo contendere, the magistrate may then fix a reasonable bail as provided by this code, and upon failure to deposit such bail or surety, shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court. The foregoing provisions of this section shall not be construed to authorize the receiving of a plea of guilty or nolo contendere from any defendant not represented by counsel. If the defendant subsequently files a written motion to withdraw the plea under Section 1018, the motion shall be heard and determined by the court before which the plea was entered.

Section 859b.

At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense. Unless the defendant waives the right, the defendant if he is in custody shall

have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.

Section 995.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

Section 1538.5.

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are

utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on

the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to

show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file such a petition, the defendant shall be released pursuant to Sec-

tion 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(1) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall

be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be

initiated after the granting or denial of such a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

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